In my opinion what the court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a *prima facie* case, and that his claim is not baseless or frivolous. In such circumstances the court will not summarily remove the caveat but will extend it until the hearing of the action. The burden of proof rests on the caveator as the person asserting the claim. In *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh*[12] (a non-unanimous decision) this court had occasion to say that it is for the caveator in an application under section 327 to satisfy the court that it is just for the caveat to remain. I think that decision is in accordance with principle and authority.

In the present case the respondent claims that he has an interest in the said land. He has filed a claim against the registered proprietors for specific performance, damages and lien over the said property. Whether he has good grounds for his alleged claim is surely worthy of argument and consideration. I cannot say that his claim is so baseless or frivolous that he should be deprived of his chance to have that tried in an action. And it would be a denial of that chance if the caveat were summarily removed, for once the appellants registered the transfer, the caveator's right, if he has any, is destroyed. I further take the view that a caveat based on a document which *prima facie* is valid will not be removed on a summary application where the facts are involved and seriously disputed. Similar premonitory hint is detectable in *S.K. Das* on the Torrens System in Malaya (pages 347-348) which was adopted in *Jit Kaur* v. *Parl Singh*[13]:

"In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The court is loth to prevent parties litigating any right that they think they may possess: *In re Caveat of Lewis* (1903) 23 N.Z.L.R. S.C. 581. Where there is a conflict of testimony the caveat will not be discharged."

For the above reasons I will dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Goh Eng Kee & Lim; Lee Kok Liang & Co.*

PUBLIC TEXTILES BERHAD v. LEMBAGA LETRIK NEGARA

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) March 16, 1976]

[Penang — Federal Court Civil Appeal No. 177 of 1974]

Evidence — Estoppel — Estoppel by negligence — Estoppel by representation — Contract to supply electricity to company — Company undercharged by mistake — Accounts rendered by National Electricity Board utilised by company for costing their products — Whether Board estopped from claiming amount — Act constituting Board founded on considerations of benefit of public in general — Doctrine of ultra vires — Evidence Act, 1950, s. 115.

Electricity — National Electricity Board undercharging customer — Whether estopped from claiming amount due if customer has acted on accounts to his detriment — Act constituting Board founded on considerations of benefit of public in general — Electricity Act, 1949.

The respondent Board had contracted to supply electricity to the appellants. By mistake it had considerably undercharged the appellants and they claimed the amount of $84,624.01 cents from the appellants. The High Court gave judgment in favour of the Board, the learned trial judge holding that the Board was not estopped from claiming the amount although the appellants had utilised the accounts rendered by the Board for the purpose of costing their products. The appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the cases of estoppel by negligence are associated with those cases in which the silence of one under a legal duty to speak or act is regarded as a representation and it is a breach of that duty which is relied upon as creating an estoppel. The doctrine of estoppel by negligence however has no application to the present case because there was an express representation by the servant or agent on behalf of the representor;

(2) the plea of estoppel by representation cannot be pleaded against a public corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public;

(3) such public corporation cannot indirectly do, by placing itself under the disability of estoppel, what it could not have directly done by reason of statutory prohibitions;

(4) the Electricity Act constituting the Board was founded not so much on considerations of trade as for the benefit of the public in general. The Board had a statutory duty to perform to assess the appellants for rates in accordance with the prescribed tariff for electricity actually supplied and the appellants had a corresponding duty to pay at the scheduled rates for electricity energy consumed. To waive the payment at scheduled rates is prohibited by the doctrine of *ultra vires*. If the plea of estoppel is allowed, the scheduled rates due in respect of the actual amount of electric energy supplied would be indirectly remitted, which the Board could not by any act directly remit. To allow the plea of estoppel would therefore be nullifying the statutory provisions of the Act.

Cases referred to:-

(1) *Maritime Electric Company Limited* v. *General Dairies* [1937] A.C. 610.

(2) *Taranaki Electric-Power Board* v. *Proprietors of Puketapa 3A Block Incorporated* [1958] N.Z.L.R. 297.

(3) *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892) L.R. 19 Ind. App. 203.

(4) *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* [1938] 1 All E.R. 52.

(5) *Swan* v. *North British Australasian Co.* (1863) 2 H. & C. 175 Ex. Ch.

(6) *Greenwood* v. *Martin's Bank Ltd.* [1933] A.C. 51.

(7) *Greenwood* v. *Martin's Bank Ltd.* [1932] 1 K.B. 379, 380.

(8) *Freeman* v. *Cooke* (1848) 2 Ex. 654, 663.

(9) *Pickard* v. *Sears* (1837) 6 A. & E. 469, 474.

(10) *Gregg* v. *Wells* (1839) 10 A. & E. 90, 97.

(11) *Moorgate Mercantile Co. Ltd.* v. *Twitchings* [1975] 3 All E.R. 314.

(12) *R.* v. *Blenkinsop* (1892) 1 Q.B. 43.
(13) *Commissioners of Customs and Excise* v. *Hobson Ltd.* (1953) 2 Lloyds Rep. 382.
(14) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] 1 All E.R. 300, 308; [1964] M.L.J. 49.
(15) *Southend-on-Sea Corporation* v. *Hodgson (Wickford) Ltd.* [1962] 1 Q.B. 416.
(16) *Smith* v. *Attorney-General* [1973] 2 N.Z.L.R. 393.
(17) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653.
(18) *Attorney-General* v. *Great Eastern Railway Co.* (1880) 5 A.C. 473, 481.
(19) *Fender* v. *Mildmay* (1938) A.C. 10.
(20) *Re a Bankruptcy Notice* [1924] 2 Ch. 76.

FEDERAL COURT:

Lim Kean Chye for the appellants.

Chin Yew Meng for the respondents.

Raja Azlan Shah F.J.: The respondents ("the Board") had contracted to supply electricity to the appellants. By mistake, it had considerably undercharged the appellants to the amount of $84,624.01 and successfully claimed that amount from them. The learned trial judge held that the Board was not estopped from claiming that amount although the appellants had utilised the accounts rendered by the Board for the purpose of costing their products. To have admitted the estoppel, so the learned judge held, would have had the effect of nullifying the statutory provisions of the Electricity Act, 1949 (Revised — 1973).

This is an appeal against that decision.

Before stating the facts on which this appeal turns, and the contentions of counsel, it seems to be convenient to refer to the relevant statutory provisions of the Electricity Act, 1949 (Revised — 1973) and the Electricity (Board Supplies) Rules, 1949, (L.N. 515/49; amended L.N. 235/64).

The Board is a corporate body constituted under section 3 of the Act, and is accordingly under a statutory duty to secure the supply of energy at reasonable prices (section 15), to enter into contracts with any person upon such terms and conditions as it may determine (section 16), and to fix the prices to be charged which shall be in accordance with such tariffs as may, from time to time, be fixed by regulations made under section 89 (section 21(1)). The Board is under the control and supervision of the Minister who appoints the members (section 5) and is required to make annual reports and returns and a copy thereof to be transmitted to the Minister as well as to be laid before the Dewan Raayat — (sections 25, 27). Although the Board has a free hand to enter into contracts for the supply of energy, the rates which it can make and exact are strictly limited, and must be in exact accordance with the provisions of the First Schedule — "contracts at scheduled rates" (rule 29). It has power to amend the schedules and to make charges for energy supplied in different places or districts on different systems, or while maintaining the same system, at different rates (rule 4(5)), but that power cannot override the statutory duty of the Board not to show undue preference or undue discrimination as between consumers similarly situated (section 21(2)). Monthly bills are rendered by the Board to the consumer which must be paid within 7 days of presentation, failing which the installation may be disconnected without further notice (rule 8(1)).

The appellants during the material times carried on a textile business in Butterworth, Province Wellesley. They had entered into a contract with the Board to buy from it electricity energy at scheduled rates — at Tariff E — Fixed Block Industrial Tariff. Because at that time a 2-way summation system was not available and because of the urgency of the appellants' need, a 3-way summation system was installed. Since the factory is using 2 power transformers, a multiplication factor of 3/2 is required to ascertain the actual units consumed. If a 2-way summation metering system is used, then a multiplication scale is not required, and a direct reading would show the actual units consumed. Due to an error of the Board's servants, the correct multiplication factor was not applied, thus the appellants were not rendered proper bills from the commencement of the contract *i.e.* December 16, 1970, until the omission was discovered on April 29, 1972. At that time an engineer of the Board was taking stock of summation current transformers in order to assess its requirements for the next annual period and he called in these forms as well as the requisitions. It was then discovered that there was discrepancy between Form LLN 98 and the particular requisition form. The former, which is normally used to advise meter readers as to what factor to use on the meter reading, showed a 2-day summation metering system, whereas the latter showed a 3-way system. Of course, the former is not correct. A junior technical assistant of the Board had not entered the correct summation current transformer. Since there is no tag on the meters to advise meter-readers to make the necessary conversion of the readings, they naturally took a direct reading of the meters, the course applicable to a 2-way summation metering system. Hence the error, thus resulting in under-billing the appellants. The Board therefore issued a supplementary bill to recover the difference between the amount for which the appellants had already been charged and paid, and the amount which should have been charged, had there been no error.

The Board grounded its claim on quantum meruit and in contract. The forefront of the defence, and indeed, the only one that merits consideration before the trial judge is the doctrine of estoppel. Since the contract between the parties was drawn up under the Act and was basically for the payment of the actual amount of electricity consumed at scheduled rates, the learned judge held the view that the Board could succeed in contract and not on quantum meruit. With that view, I am in complete agreement. Where, as here, the claim is based on contractually agreed sum, for example, under Tariff E of the First Schedule to the Electricity (Board Supplies) (Amendment) Rules, 1964, quantum meruit does not lie.

The learned judge treated the case as governed principally by the Privy Council decision in *Maritime Electric Company, Limited* v. *General Dairies, Ltd.*[1] and upheld the Board's claim because he felt constrained to do so by that decision. He said: "In the present case, I accept, with respect, that the local statute is of the type considered in the Maritime Electric Company's case and I must accordingly hold that there

can be, even if the facts justify it, no admission of an estoppel to nullify the statutory provision. The duty of the defendants is to pay for the electricity consumed at the rates determined." The facts in *Taranaki Electric-Power Board* v. *Proprietors of Puketapu 3A Block, Incorporated*,[2] a case of the Court of Appeal in New Zealand, bear a resemblance to the facts of the present case, and needless to say, that case was strongly relied on by the appellants. The learned judge however distinguished *Taranaki's* case from the present case both on the facts and in the provisions of the respective statutes. He said, *inter alia*, the Board's duty to fix and collect reasonable prices for the supply of energy immediately takes the present case outside the ambit of *Taranaki's* case and puts it fairly within the scope of *Maritime Electric Company's* case. So it is necessary to examine the authorities to seek to determine what principles can be deduced from them.

The doctrine of estoppel is enacted in section 115 of the Evidence Act, 1950, which is *in pari materia* with section 115 of the Indian Evidence Act. Of the latter it is conceded that the law it enacts is the same as English law: see *Sarat Chunder Dey* v. *Gopal Chunder Laha*.[3] It seems to me that what was there said in relation to the Indian Evidence Act must apply *a fortiori* to our Evidence Act. Our Evidence Act which gets its inspiration from the Indian Evidence Acts does not therefore enact as law anything different from the law in England on the subject of estoppel, and English decisions on the subject are relevant to the determination of questions arising for decision under the Act.

The appellants relied on the doctrine of estoppel by negligence and also estoppel by representation. Of the former they pointed to 4 specific acts of negligence of the Board's employees: — (a) installation of the wrong equipment, *i.e.*, the appellants asked for a 2-way summation system, but a 3-way summation system was installed, (b) in view of the fact that no proper equipment was available, why did the Board not instal a direct metering system, (c) failure to affix a warning tag, and (d) the absence of wiring plan.

With regard to (a) and (b), the learned judge held that because at the relevant time a 2-way summation system was not available and of the urgency of the appellant's needs and that a 3-way summation system was available, and that was ordered by the appellants, the latter system was installed. That is a finding which had got the sanctity of a pure finding of fact with which, of course, this court cannot interfere. It is not however controverted in the court below that to instal a 3-way summation system for 2 transformers is an internationally accepted practice. Indeed the metering system installed in the factory are in accordance with British Standard Specifications. The purchase was inspected by the Crown Agents in London and also tested by the Board's employees. I accept this evidence for it was not seriously contradicted.

Whatever could have been said about the failure to indicate the multiplication factor, in my view, the term estoppel by negligence is misleading; it is only one aspect of estoppel by conduct. Spencer Bower (Estoppel by Representation (2nd Edn. 1966) page 69) in his well-known text said:

> "It is relevant at this point to make mention of the expression 'estoppel by negligence', the use of which has encouraged some to consider this so-called variety of estoppel as in a separate class. It is conceived that there is no justification whatever for such a special classification. The term 'estoppel by negligence' is used to signify those examples of estoppel in which the silence of one under a duty in the circumstances to speak will be taken to estop him from denying the truth of the assumption which by his silence he has allowed to be made. It is this breach of a duty to speak which is the negligence which is alluded to in the term estoppel by negligence."

On the case law I need only refer to the speech of Lord Wright in the Privy Council case of *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.*[4] where after recalling Blackburn J's dictum in *Swan* v. *North British Australasian Co.*[5] that "it must be the neglect of some duty that is owing to the person led into the belief" concluded that estoppel by negligence must always depend upon the existence of a legal duty owed by him who is sought to be estopped to the person raising the plea.

Therefore, mere silence cannot operate as an estoppel unless it is established that there is a duty to speak or act. Then deliberate silence or inaction becomes equivalent to a representation as much as if a representation has been made by express language or positive acts. I propose to refer only to *Greenwood* v. *Martins Bank Ltd.*[6] as it affords a good example of a whole line of cases on the subject. In that case the husband owed a duty to the bank to disclose his wife's forgeries when he became aware of them so that the bank could take steps to sue the forger, but through his silence or failure to disclose the bank was prevented from taking action against the forger. In an action by the husband against the bank to recover the sums of money paid out by the latter on account of his wife's forgeries, the husband, because of his silence or failure to disclose the forgeries which he was under a legal duty to do, was held estopped from asserting the cheques were forgeries. Scrutton L.J. in the Court of Appeal[7] states the principle with great precision:

> "The classic exposition of the principle of estoppel is that given by Parke B. in delivering the judgment of the Court in *Freeman* v. *Cooke*.[8] He cites the rule in *Pickard* v. *Sears*[9]: "That, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And continues, "The principle is stated more broadly by Lord Denman, in the case of *Gregg* v. *Wells*,[10] where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

Lord Tomlin in the House of Lord ([1933] A.C. on page 58) said:

> "The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced — namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel."

In my view, the so-called cases of estoppel by negligence are associated with those cases in which the silence of one under a legal duty to speak or act

is regarded as the representation, and it is a breach of that duty which is relied upon as creating an estoppel. But where there is an express representation made by or on behalf of the representor, negligence as a necessary element in estoppel is not relevant. The judgment of Browne L.J. in *Moorgate Mercantile Co. Ltd.* v. *Twitchings*[11] contains a valuable exposition of certain features of the law. He said (page 326):

"In my view, negligence is not a necessary element in estoppel where there has been an express representation made by or on behalf of the representor. Negligence, and therefore duty, are relevant where a party is alleging that silence or inaction amount to a representation, because in such cases he must establish a duty to speak or act: see Spencer Bower, and e.g. *Greenwood* v. *Martins Bank Ltd.*"

Adopting that hint — if it be permissible to regard it as such — the doctrine of estoppel by negligence has no application to the present case, because here there was an express representation by the servant or agent on behalf of the representor, the Board.

Turning to the plea of estoppel by representation, there appears to me to be, consistently with the authorities as I understand them, a valid reason why the appellants could not succeed in their appeal. The appellants never at any time argued the accuracy of the meter readings; their case throughout the proceedings in the court below and before us has been that where the Board as creditor renders its monthly account to the debtor, the appellants, and the latter pays, and the creditor accepts, the amount shown therein as the amount finally owing, the creditor is estopped from later representing a correct account, if by reason of the promises the appellants have moved to their detriment. The monthly account is said to be the representation; the detriment to be that it had utilised the monthly accounts rendered by the Board for the purpose of costing their products.

The appellants' argument is entitled to some weight, but I do not think the proposition is here accurately formulated by them. The true position, in my opinion, is that the rules as to the nature of the representation alleged have only limited application to promissory estoppel.

I will now examine the question on principle as to when estoppel can be pleaded against a public corporation. For that purpose it may be convenient now to examine closely the case of *Maritime Electric Company, Limited* v. *General Dairies Limited, supra.* In that case the relevant words of section 16 of the Public Utilities Act of New Brunswick were: "No public utility shall charge, demand, collect or receive a greater or less compensation for any service, than is prescribed in such schedules as are at the time established, or demand, collect or receive any rates, tolls or charges not specified in such schedules." The Maritime Electric Company, a private company which generated and supplied electrical power in the City of Frederiction, New Brunswick, were a public utility company within the meaning of the Act, that is to say, a commercial undertaking formed for promoting public interest, and were accordingly under a statutory duty to furnish reasonably adequate service and facilities and were strictly limited, in accordance with filed schedules open to public inspection, as to the rates, tolls and charges which they could make and exact (sections 14, 15). If it charged different rates to different customers it would be guilty of "unjust discrimination" (section 18), and would be charged to a penalty. Section 19 provided that: "no person, firm or corporation "shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free or at a less rate than that named in the schedules in force, as provided herein, or whereby any service or advantage is received other than is herein specified."

A penalty was also provided for violation of this section.

General Dairies Ltd., who carried on a dairy business in Fredericton, bought from the Electric Company electric energy which they used in the manufacture of butter, ice-cream and other milk products. To arrive at the correct amount of electric energy supplied it was necessary to multiply the meter dial reading by ten, but owing to a mistake on the part of the Electric Company that was not done over a period of twenty-eight months, with the result that during that time General Dairies were charged with only one-tenth of the electric energy supplied to them. The bills so made were duly paid by General Dairies. That company was purely a commercial undertaking. On the basis of these payments so made it prepared its annual balance sheets, which consequently showed more profit earned than these balance sheets would have shown if the electric bills had been correctly made out. The company accordingly declared larger dividends and paid them to its share-holders. Thereafter the Electric Company discovered its mistakes and made further demands for those past years by supplementary bills. Those bills not being paid, the Electric Company brought the suit to recover the balance of nine-tenths. General Dairies pleaded estoppel. It was admitted that General Dairies acted on the representation made in the original bills as to the amounts payable for electric energy supplied in the belief that the representations were true and had acted on those representations to its detriment by paying larger sums of money as dividends to its share-holders. It was held by the Privy Council that the Electric Company was not estopped from recovering the sum claimed. "The duty imposed by the Act on the Electric Company to charge, and on General Dairies to pay, at scheduled rates, for all the electric current supplied by the one and used by the other could not be defeated or avoided by a mere mistake in the computation of accounts. The relevant sections of the Act enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to General Dairies to set up an estoppel to prevent it. An estoppel is only a rule of evidence, and could not avail to release the Electric Company from an obligation to obey the statute, nor could it enable General Dairies to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law." See the speech of Lord Maugham on pages 619, 620. In my opinion the key words in his speech are the following: "The court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the

statutory provision." The principle on which the decision rests is that a corporation cannot indirectly do, by placing itself under the disability of estoppel, what it could not have directly done by reason of statutory prohibitions.

There is a considerable number of existing authority to support the decision in the *Maritime Electric Company* case. For example, it had been held in *R.* v *Blenkinsop,*[12] one of the cases cited to us, that the overseers of a parish who had charged a railway company only one-third of their correct share of the rates could recover the balance in an action for arrears. The court held that an estoppel could not arise in that case since the ratepayer's liability was not a private debt but a public obligation.

There are also a number of later decisions that go the same way. In *Commissioners of Customs and Excise* v. *Hebson, Ltd.,*[13] Pearson J. held that customs officers who had mistakenly allowed imports of goods of a certain type in the past were not thereby estopped from claiming that goods of the same type were being imported in contravention of an order under the Import, Export and Customs Powers (Defence) Act, 1939. The learned judge said (page 396):

"An officer having a public duty cannot be deprived of his duties and powers, or cannot be prevented by any estoppel from performing their duties and powers which he has a statutory or other public obligation to exercise in the general public interest."

In *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*[14] the Privy Council had occasion to consider *Maritime Electric Company's* case with reference to the plea of estoppel in the face of a statute and explained it in this way (page 308):

"Thus a corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppel *in pais* from performing its duty and asserting legal rights accordingly."

and

"Gives a 'statutory obligation of an unconditional character' it is not open to the court to allow a party bound by the obligation to be barred from carrying it out by the operation of an estoppel."

Subsequent decisions show that it has been extended to cover cases where the statute lays down a duty to exercise a discretion which is intended to be performed or exercised for the benefit of the public: see *Southend-of-Sea Corporation* v. *Hodgson (Wickford) Ltd.,*[15] *Smith* v. *Attorney-General.*[16]

It is manifest that the principle of estoppel as laid down in *Maritime Electric Company* is not eroded in modern times but in fact appears in our law in many forms. That principle is not formulated for the first time in that decision but is a well established principle. It is stated in general and in more comprehensive terms in 15 *Halsbury's* Laws, (3rd Edn.) 223-232, 235-246, paragraphs 422-434, 440-454. There is no justification for jettisoning that case in order to save the appellants. That case was decided 38 years ago by the court and has been acted upon ever since as dependent upon and enshrining a true legal principle that estoppel cannot be set up to hinder the performance of a statutory duty. It is the leading authority on the subject. In many of the cases to which our attention have been drawn, the court has not been in any doubt or difficulty as to the principle, which has been established so firmly that nothing can shake it now, but only as to the application of the principle to different sets of facts.

It will be seen that the cases referred to above are concerned with the proposition that we cannot avoid our statutory duties in the face of an estoppel. It is our bounden duty to obey the law which is enacted in the interests of the general public or a section of it. In other words, in cases where the doctrine of estoppel has been excluded it is because to have decided otherwise would have allowed a person to achieve by an estoppel against himself something which he could not otherwise lawfully do. In the *Maritime Electric Company's* case, for example, to have allowed the operation of estoppel against the Electric Company would be to have allowed it to do an *ultra vires* act, which by the statute creating it enacted that it could not lawfully do, *i.e.*, not to collect charges at scheduled rates. The result would have adversely affected someone to whom the Electric Company owed a duty — the public of Fredericton.

Therefore the *Maritime Electric Company* case can be explained in this way. The company was performing a duty in claiming the scheduled charges for electricity consumed. As far as that duty was concerned, it could not be estopped from performing it. Under the Public Utilities Act of New Brunswick it had a duty to perform, namely to charge a certain amount, no more, no less, for their services.

Accordingly in cases of this kind the first duty of the court is to determine the nature of the obligation imposed by the statute on the parties which prevents the plea of estoppel being raised. If the statute is enacted for the benefit of someone other than the person against whom the estoppel is pleaded, then the doctrine of estoppel is excluded. Because the statute must be obeyed, it is sometimes called a "positive", or an "imperative" statute. It is not always easy to decide whether a particular statute is laying down a positive duty or a negative one. Hence the issue is one of considerable difficulty, and importance.

An elaborate argument has been addressed to us on the interpretation of the Electricity Act, 1949. It has been said on behalf of the appellants that for the doctrine of estoppel to apply the Act in question must have been enacted on principles of public policy, and that the Electricity Act is not of this category. Counsel submitted that the Board is nothing but a trading corporation enacted under the Act which does not have provisions similar to sections 14, 15 and 16 of the New Brunswick Act. Our Act imposes no duty to assess rates as the Board is given a free hand to fix them in view of its powers to amend the schedules at any time it sees fit (rule 4(5)); and section 89 does not empower the Board to make penal provisions for disobeying any of its provisions. Since there is no punishment provision, it is said that the Board can waive the payment of scheduled rates and accept less than that prescribed and accordingly would not be acting ultra vires the Act. It is further said that the rules prohibit the issue of supplementary bills. Therefore it is argued that the Electricity Act is outside the public policy principles and accordingly brings it in

line with the provisions of the Electric Power Boards 1925 which was construed in *Taranaki's* case.

The facts in *Taranaki's* case cannot be more adequately put than was stated by the learned judge in his judgment. He said: "Shortly after the installation of the new equipment, the defendant's mill manager noticed that the accounts rendered by the Board for electricity were less than had been in the past. He drew the attention of the Board's inspector to that circumstance and the inspector re-checked the wiring but could detect no fault. Some 3 years later, a meter became defective and was replaced. A sum of £39 8s was demanded and paid as a fair and reasonable adjustment, on the assumption that the defect in the meter had existed for the previous year. Two years later by using check-meters, it was found that the current drawn from one of the transformers was insufficiently recorded by reason of the wrong connection of a cable from the transformer to the meter, although the manufacturer's tag indicated it was correctly connected. Further tests appeared to establish that the short payment for the period from August 3, 1950 to October 30, 1955 came to £1,181 7s 5d, comparatively a smaller sum for a much longer period. North J. considered that the payment of £39 8s amounted to a representation of the existence of a certain state of affairs and perhaps was a compromise of all past claims. He also held that the monthly accounts thereafter were also representations of the existence of a certain state of affairs. This state of affairs was acted on by the consumer to its damage in the belief of its truth. The learned judge also found that the knowledge of the defect was solely in the possession of the Board and the defendant in the nature of things also had no possible means of verifying the accuracy or otherwise of the Board's accounts and the defendant had throughout displayed the utmost frankness."

I do not find anything in *Taranaki's* case which can be of assistance to the appellants. That case turns on special facts and in my view there is a manifest distinction between that case and the present. I have indicated how the learned judge distinguished that case. Adding to what he has there said, it is possible to state summarily what is the essential difference between that case and the present. There North J. had to consider section 82(o) of the Electricity Power Boards 1925, which authorises power boards to sell electricity to any local authority or consumers generally within the district in bulk or otherwise on such terms and conditions as it deems fit. Owing to a defect in the meters, the Board had charged the defendants for less supply than had been actually supplied. The learned judge held no offence or breach of a statutory prohibition was committed by the Board in supplying electricity to the defendants at the amount charged in the monthly statements, and that there were, therefore, no obligations imposed by the provisions of the Electricity Boards Act, 1925, and the regulations made thereunder, either on the Board or on the defendants, which prevented the plea of estoppel being raised. The defendants had been led into the belief that the monthly accounts were correct, and in so acting on them they did so to its prejudice.

In my view, in *Taranaki's* case it is not an offence to supply and to charge electricity *less* (italics are mine) than the actual supply recorded on the defective meters. In our case, it is admitted that the meters were never defective; therefore the supply of energy is never in question. The supply of electric energy was correct but the appellants were undercharged. The question arises whether it is ultra vires the Electricity Act to charge the appellants at less than the scheduled rates? If the answer is in the affirmative, if it is ultra vires the Act, then the operation of the doctrine of estoppel will nullify the statutory provision. Here it is necessary to distinguish between a natural person and an artificial person, *i.e.*, a corporation. In the case of a natural person whatever is not expressly forbidden by law is permitted by law. He has the capacity to do everything save and except those forbidden by law. In the case of a corporation the rule applicable to a natural person is reversed. Whatever is not permitted expressly or by necessary implication by the incorporating statute is prohibited not by the express or implied prohibition of the legislature but by the principle of ultra vires: see *Ashbury Railway Carriage & Iron Co.* v. *Riche;*[17] *Attorney-General* v. *Great Eastern Railway Co.*[18]

In construing the Electricity Act, 1949, it is not correct to go by the criterion that it must be framed on principles of public policy. The term public policy is vague and unsatisfactory. From time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The "unruly horse" of Hobart C.J. is common place: see *Fender* v. *Mildmay.*[19] In my opinion, the public policy yardstick is too wide and elusive. The true test, as it seems to me, is the principle of public interest, that is, whether looking at the Act as a whole and particularly at the relevant provisions, it is framed for the benefit of some third party, or the state or public at large or a section of it. We need to ascertain where the duty is imposed, for whose benefit it is imposed and why it has been imposed. The point has been canvassed in *Kok Hoong* v. *Leong Cheong Kweng Mines, Ltd., supra.* It think it is not inexpedient to quote a passage from the speech of Viscount Radcliffe which expresses, in my view, the correct test (page 308):

> "It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied on is imposed in the public interest or "on grounds of general public policy" (see *Re a Bankruptcy Notice,*[18] per Atkin L.J.). However a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might not be made. In their lordships' opinion a more direct test to apply in any case such as the present, ... is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise."

Applying that test, the Electricity Act does not appear to me to be founded on considerations of trade as for the benefit of the public in general. It is enacted to give the Board the sole monopoly in the Federation to generate, distribute and sell electric energy at reasonable prices. Indeed the learned judge in his judgment said that it is conceded by the defence that the Board is a public utility operating under the Act. It has a duty to perform — to assess the appel-

lants for rates in accordance with Tariff E of the First Schedule to the Rules, no more, no less, for electricity actually supplied. Equally, the appellants have a corresponding duty to perform — to pay at scheduled rates, no more and no less, for electricity energy actually consumed. That is a statutory obligation for which the Board is responsible to the Minister who is in turn responsible to Parliament. To waive the payment at scheduled rates is "prohibited not by the express or implied prohibition of the legislature but by the doctrine of ultra vires." In other words, if the plea of estoppel is allowed, the scheduled rates due in respect of the actual amount of electric energy supplied which are not irrecoverable, for it has been sued, would be indirectly remitted which the Board could not by any act directly remit. That would be nullifying the statutory provisions of the Act.

It seems to me that our case amounts to no more than a reassertion and reapplication of the doctrine of estoppel as laid down in the *Maritime Electric Company* case and that the present situation is exactly within the language of Lord Maugham which is in conformity with a long line of previous decisions to be found in 15 *Halsbury's* Laws of England (3rd Edn.).

I would accordingly dismiss the appeal with costs.

Gill C.J. (Malaya) and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Lim Kean Chye & Co.; Allen & Gledhill.*

HALIMAH BINTI ABDUL RAHMAN v. FATIMAH BINTI ABDULLAH

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) March 20, 1976]

[Alor Setar — Federal Court Civil Appeal No. 88 of 1975]

Land Law — Agreement for sale of land — Vendor in possession of surat akuan — Application made for title — Conditional sale — Whether enforceable when vendor given title — Contracts Act, 1950, ss. 10(1), 24 and 33(a) — Kedah Land Enactment ss. 2, 15.

Contract — Contingent contract — Conditional sale — Contracts Act, 1950, ss. 10(1), 24 and 33(a).

In this case the respondent who had been given a *surat akuan* applied for a *surat putus kechil*. She was granted this but the *surat putus kechil* was subsequently cancelled for non-payment of quit rent and the land reverted to the State. The respondent subsequently reapplied for the land. Soon after that, she agreed to sell the land to the appellant, making it clear in the agreement that she was not its owner but had applied to the State for the land and promising to complete the deal after she obtained title from the State. The appellant paid $300 towards the purchase price and went into occupation of the land. After the respondent obtained the necessary document of title, the appellant asked her to complete the sale but she refused to do so. The appellant thereupon applied for specific performance. This was refused in the High Court on the ground that as the land had reverted to the State the agreement offended against section 195 of the Kedah Land Enactment relating to unlawful occupation of State land. The appellant appealed.

Held, allowing the appeal: the appellant's claim should have been allowed as this was not an outright sale but a conditional sale to be completed when the vendor's application was approved by the State. The contract in this case was clearly enforceable in law.

Case referred to:-

(1) *Brickles* v. *Snell* [1916] 2 A.C. 599.

The following authorities were also cited in argument: *Malaya Borneo Building Society Ltd.* v. *Ramachandran* [1967] M.L.J. 182, 188; *Hassan* v. *Ismail* [1970] 1 M.L.J. 210, 211; *Chin Tai* v. *Siow Shiow & Ors.* [1971] 1 M.L.J. 67, 68.

FEDERAL COURT.

Oo Gin Sun for the appellant.

Ajmir Singh Sandhu for the respondent.

Ali F.J.: This is an appeal against the dismissal of an action for specific performance of an agreement which is in the following terms:

"I, Fatimah binti Abdullah (i/c K.442506 (AS)) residing at 1¼ milestone Jalan Sungei Korok, Alor Star, made this document for the custody of Halimah binti Abdul Rahman (i/c K.015860 (KS)) residing at Langgar 2, Mukim of Langgar, Kota Star as evidence in the future.

There is a piece of Government land which I applied at the Land Office Kota Star according to LOKS (KS) 392/76 in Mukim of Kubang Rotan in area 8 relong (eight) for cultivation of padi, I, Fatimah admit to sell 'usaha saya' on the said land to Halimah binti Abdul Rahman for the sum of $300 (Dollars three hundred only). The said sum mentioned I, Fatimah admit receiving from Halimah and I have handed possession of the said land to Halimah for her to enter and cultivate. My agreement Fatimah with Halimah is that when the Government issue the documents of title on the said land then at that time, I, Fatimah undertake to transfer to the name of Halimah binti Abdul Rahman and all expenses payable at the time I, Fatimah undertake to pay."

"Both of us abovementioned have hereunto affix our respective signatures hereunder in the presence of witnesses, dated March 2, 1957 (August 1, 1376).

Thumbprint of Fatimah bt. Abdullah (Vendor)	Sd. Md. Isa b. Ibrahim Witness (i/c K.407850)
Thumbprint of Halimah bt. Abdul Rahman (Purchaser)	Witness Sd. Jaafar bin Ilias (i/c K.178444)"

Sometime in October 1967, i.e. about 10 years after the agreement the vendor's application was approved and she was issued with the necessary document of title. By a notice dated June, 1968 the purchaser, Halimah, asked the vendor, Fatimah, to complete the agreement which was refused. Hence the appellant's action for specific performance.

It was common ground that the purchaser had paid $300 towards purchase price and that at all material times she has been in occupation of the land.

The vendor, Fatimah, in answer to the purchaser's statement of claim pleaded various grounds in support of her contention that the agreement is void. In paragraph 2 of her defence statement she pleaded uncertainty which, however, was not argued or considered at the trial. In paragraph 3 she pleaded that since at the time of the agreement the land was State land she had no *locus standi* in respect of the land. In other words, the agreement is void because she had no title. This was argued at the hearing but was not considered by the learned trial judge. In any case I can see no merit in the argument in view of what is stated by *S.K. Das* in his book on the Torrens System in Malaya. On page 358 the learned author wrote: